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# Supreme Court of the United States

OCTOBER TERM, 1943

No. 737

ATLANTIC COASTLINE RAILROAD COMPANY,

*Petitioner,*

against

SIDNEY BLUMENTHAL & COMPANY, INC.,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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# United States Circuit Court of Appeals

OCTOBER TERM, 1943

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| ATLANTIC COASTLINE RAILROAD COMPANY, *Petitioner,* against SIDNEY BLUMENTHAL & COMPANY, INC., *Respondent.* | No. 737 |

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement.

The decision of the United States Circuit Court of Appeals, 2nd Circuit, not only reversed the District Court but also remanded the cause for a new trial (R. 235).

This action arose out of damage sustained by respondent's goods in the stipulated amount of $17,157.55 while in transit under a through railroad bill of lading issued in Interstate Commerce (R. 214). This shipment was routed by the respondent from Rocky Mount, North Carolina, to Shelton, Connecticut, all rail (not part rail and part water). Therefore, the cheaper, part rail and part water, freight rate was not paid, nor were the extra hazards of transport by water assumed by shipper.

The petitioner sued respondent as "Initial Carrier" under the Carmack Amendment to the Interstate Commerce Act.

The railroads were acting as common carriers (insurers) and not as towers or bailees, who are involved in most of the cases cited by petitioner.

## Comments on Petition's Summary Statement.

The petition states (p. 3) "The District Court further found that hurricane warnings were flown from the New York Weather Bureau from noon to 2:15 P. M., at which time the hurricane warnings were hauled down."

The District Court's finding (R. 216) was that "whole gale warnings were flown to about 2:15." There is no finding as to when the whole gale warnings were hauled down—merely a finding that at 2:15, the New York office "received from the main office in Washington, instructions to 'haul down the whole gale signals and substitute northwest storm signals.'"

The petition (p. 3) refers to the Northwest Storm Signals as "forecasting less severe weather." The District Court did not so find and this 2:15 warning itself read (R. 214) "No material change in intensity since morning."

In any event, petitioner did nothing to ascertain from the Weather Bureau, what the forecasts and warnings were, nor the action of the barometer, nor did it advise its dispatchers or tug captain of such facts.

## POINT I.

### The conclusions of law of the District Court as to negligence and liability were reviewable on appeal.

The First Point assigned by petitioner for granting a writ is that the decision of the Circuit Court of Appeals as to its right to treat "de novo" the District Court's findings as to negligence is in conflict with the decisions of the Circuit Court of Appeals for the Fifth, Eighth and Ninth Circuits, in cases cited.

In its Opinion, the Circuit Court of Appeals has not disturbed any of the Findings of Fact of the Trial Judge, nor did it use the expression "*de novo.*"

After the close of the trial, the Trial Judge stated (R. 206):

> "No matter what the witnesses say, they cannot contradict the records. I think in all these cases the records are of much greater probative force than anything a witness may say as to how strong the winds were or how high the waves were."

The Weather Bureau Records were in evidence (R. 214), but the Trial Judge evidently overlooked them and declined to receive briefs (R. 205, 206 and 207) which could have pointed out the pertinent portions of these records.

The Circuit Court of Appeals however, without altering the Findings of Fact, sets forth in its Opinion, many of the Weather Bureau Records, and fits them in together with the Findings of Fact without conflict.

It is only as to the Conclusions of Law respecting negligence and the liability of the railroad common carriers, that the Circuit Court of Appeals disagreed with the District Court.

Where the law applied to the facts reposes unuttered in the mind of the District Court, no presumption of correctness obtains and the Circuit Court of Appeals may review the ultimate finding of negligence.

> *Johnson* v. *Kosmos Portland Cement Co.*, 64 Fed. (2) 193 (6th Circuit 1933) p. 194 (certiorari denied 290 U. S. 641).

Indeed the District Court recognized that the finding of negligence was an ultimate conclusion of law for it treated it as such (R. 215-7).

Furthermore the petitioner apparently overlooks the effect of the adoption of Rule 52 of the Rules of Civil Procedure in 1938.

The effect of the adoption in 1938 of the Rules of Civil Procedure, and Rule 52 (a) is summarized in the case of *Aetna Life Insurance Company* v. *Kepler*, 116 Fed. (2) 1, 4 (Circuit Court of Appeals, 8th Circuit 1941) in which the Court discussed this change as follows:

> "(3) Prior to the effective date (September 16, 1938) of the Rules of Civil Procedure, the findings of fact of a trial court, in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and, unless clearly against the weight of the evidence or induced by an erroneous view of the law, would not be disturbed by a reviewing court.
>
> Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides '* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *.'
>
> The effect of Rule 52 (a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.
>
> This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals.
>
> (4) The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court."

See also *Hughes Federal Practice* (1940) Vol. 18, pp. 34, 37, 38. Also *Hughes Federal Practice, Supplement of 1943,* p. 100.

There is no conflict between the Circuit Courts of Appeal with respect to the power of the Circuit Court of Appeal to review the ultimate question of negligence since the adoption of Rule 52, with respect to jury-waived trials. The cases cited by the petitioner which deny this power, antedate the adoption of Rule 52.

In the cases cited by petitioner which have arisen since the adoption of the Rules of Civil Procedure, the Circuit Courts of Appeal showed no hesitation in reviewing the principles of law and the standard of care applied by the District Court to the factual situation and after approving the standard applied by the Trial Court also reviewed the facts and found no error.

At all events, the District Court in the instant case made no reference to "negligence" in its Findings of Fact; only in its Conclusions of Law (R. 215-7).

## POINT II.

**A railroad is in duty bound to keep itself advised from the Weather Bureau of unusual threatening storm hazards, and inform its employees having the custody and care of goods in transit.**

The Second Point of petitioner (pp. 6 and 11) is that the decision of the Circuit Court of Appeals as to the effect of Weather Bureau storm warnings is in conflict with the decisions of the 3rd and 4th Circuit and is in conflict with various prior decisions in the 2nd Circuit.

The Petition states (p. 11) that the District Court found that the hurricane was not anticipated by the local office of the United States Weather Bureau and that the finding was supported by the testimony of the Weather

Bureau meteorologist. The meteorologist so testified, but qualified by adding "*as of 2:15 P. M.*" (R. 138) that is, at the moment when he received from Washington the warning stating that the "storm *center* will likely pass over Long Island." The Finding does not state the time as of which the New York Office did not anticipate the hurricane.

The meteorologist testified with respect to the warning received at 2:15 P. M. (R. 137):

> "We anticipated that the hurricane would pass close to Long Island—pass across Long Island, when we issued the warning" (R. 138).

and that the warning was not issued until *after* 2:15 P. M. (R. 138).

Naturally, as the storm center moved northerly and approached closer to Long Island, the wind velocity in New York harbor would and did steadily increase. Between 2 and 3 P. M. the average was 60 and maximum 69 and between 3 and 4 the average was 62 and maximum 70 (R. 214). The accident happened at 2:45 P. M. (R. 38).

The Petition (p. 12) states, "The Court (C. C. A.) found that the 2:15 P. M. message was received too late to stop the tug, reversing the Trial Court on a question of fact."

The District Court found:

(a) That at 2:15 P. M. the tug pulled the floats and started to tow them to Bay Ridge (R. 215).

(b) That the tug left Greenville bound for Bay Ridge at 2:15 P. M. (R. 216, P. 5).

(c) That the voyage of the tug started at 2:15 P. M. (R. 217).

It is not reasonable to charge the tug departing at 2:15 P. M. with a warning received by the Weather Bureau at 2:15 and not published until *after* 2:15 (R. 138).

The decision of the Circuit Court of Appeals 2nd Circuit, in the instant case, is in agreement with the other Circuits as well as with this Court.

The Weather Bureau was established by Congress prior to 1900 and its purpose is stated in Section 313 of Title 15 United States Code Annotated, as follows:

> "The Chief of the Weather Bureau shall have charge of the forecasting of weather, the issuance of storm warnings and display of weather signals and flood signals for the benefit of agriculture, commerce and navigation."

The damage to plaintiff's merchandise occurred while in rail transit across the New York harbor on a carfloat operated by a connecting rail carrier. The shipment was a shipment in Interstate Commerce. The lighterage service at New York harbor was adopted by the Railroad Companies many years ago and has been recognized as an integral part of the rail transit by the Statutes and the Regulations of the Interstate Commerce Commission for many years. Both the Pennsylvania Railroad and the New York, New Haven & Hartford Railroad operate a veritable fleet of tugs, carfloats and barges as an integral facility of their rail transportation. (See Official Publication of the United States Department of Commerce "Merchant Vessels of the United States 1937," pp. 732, 741.)

In *Railroad Co.* v. *Lockwood,* 84 U. S. 357 (17 Wall. 357), Mr. Justice BRADLEY said at page 377:

> "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent

motive for the exercise of carefulness and fidelity in his trust."

To the same effect, *Chicago & E. Company* v. *Collins Produce Company,* 249 U. S. 186.

In *Union Steamship Co.* v. *Virginia Steamship Co.,* 65 U. S. 307, 313, this Court said:

> "It is not inevitable accident, as was well remarked by the learned judge in the case of Juliet Erskine, 6 Notes of Cases 634, where a master proceeds carelessly on his voyage, and afterwards circumstances arise, when it is too late for him to do what is fit and proper to be done." He must show that he acted seasonably, and that he "did everything which an experienced mariner could do, adopting ordinary caution. * * *"

In the case at bar the Trial Judge declined to go along as far as this (R. 211).

This Court in *Commercial Molasses Corp.* v. *N. Y. Tank Barge,* 314 U. S. 104 (citing cases) said at page 109:

> "One who has assumed the obligations of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking, or for which it permits him to stipulate. The burden rests upon him to show that the loss was due to an excepted cause and that he exercised due care to avoid it, not in consequence of his being an ordinary 'bailee' but because he is a special type of bailee who has assumed the obligation of an insurer."

In *Texas & Gulf Steamship Co.* v. *Parker,* 263 Fed. 864 (certiorari denied 253 U. S. 488) the vessel had put out in the face of storm warning signal. The Circuit Court of Appeals (5th) said at page 868:

> "The exceptions in the bill of lading are not available where the 'Act of God' from a peril of the sea causing the loss could have been avoided by the exercise of due care and diligence. In that event, the negligence and not the peril of the sea is deemed the proximate cause of the loss."

The case of *Chesapeake & Ohio Railroad* v. *Wix & Sons,* 87 Fed. (2nd) 257 (C. C. A. 4th 1937) involved damage to tobacco in cars during the famous Norfolk hurricane of 1933. The Court said at page 259:

> "A well considered case substantiating the position taken by the trial judge is that of Ferguson v. So. Railway, 91 S. C. 61; there the Court said: 'It requires no citation of authority to sustain the proposition that, after the carrier has discovered, or by the exercise of reasonable prudence and diligence should have discovered, that goods in his possession are subject to the perils of an unprecedented flood, or other vis major, it is his duty to exercise reasonable care and diligence to save them from damage or loss.'"

and also at page 259:

> "This court would be inclined to go further and say that the defendant was negligent as a matter of law in its failure to maintain a more adequate system of weather observation in order to safeguard the property of others which had been entrusted to its custody for transporting and transferring to Steamship Lines."

At page 14 the petition cites in support of its Point II the *E. V. McCaulley,* 90 Fed. 510 C. C. A. 3 and at page 15, the *Fred Smartley Jr.,* 100 Fed. 2nd 971, C. C. A. 4; *Bronx Barge Corp.* v. *Connelly,* 35 Fed. 2nd 294, C. C. A. 4; *Morris & Cummings Dredging Co.* v. *Moran,* 163 Fed. 610, affirmed 177 Fed. 1,004, C. C. A. 2, and *The Argus,* 31 Fed.

481, D. C. Del., in all of which cases the tugs put out when *no* storm signals were flying. In the instant case storm warning signals were flying from 7 A. M. until 6:30 P. M., nor was the Common Carrier's liability and duty involved in the above cases.

**There Is No Conflict With Prior Decisions in the 2nd Circuit Except as to Jural Personality.**

The petition then cites cases in the C. C. A. 2nd Circuit, as in conflict with the instant case. However, an analysis of prior decisions of the 2nd Circuit will show no disagreement with the instant decision except as to Jural Personality of the Tug.

In *Bouchard Transp.* v. *Pennsylvania RR. Co.*, 6 Fed. 2nd 362, C. C. A. 2, storm signals were flying. It was said:

> "It is true that masters are chargeable with notice of such warnings (*Nicholson* v. *Erie RR. Co.*, 255 Fed. 54, C. C. A. 2) and are *prima facie* negligent if they do not see them."

In *O'Brien Bros. Inc.* v. *Director General of Railroad*, 287 Fed. 543, Judge WARD (1922), said at page 544:

> "(1) If the liability in this case depended solely on the conduct of the master of 'No. 10,' I should have some hesitation in holding the Director General liable. But I think that, in case of persons who are largely interested in handling boats without motive power of their own in this harbor, the court should go back of the tug captains in the inquiry whether due care and skill and diligence have been exercised in the premises. The evidence is that the local Weather Bureau at New York knew, not only from the dispatch from Washington at 8 P. M. of the 13th, but from the steady backing of the wind from east to northeast and from the rapid and uniform falling of the barometer, that a violent storm from the northwest was to be expected. The office is open day and night, and inquiries are constantly made

of it by persons interested in harbor shipping. The captains of these harbor tugs are not left to act on their own responsibility, as the masters of ships at sea must be left. Their movements are regulated direct from the office of their employers.

(2) When the government supplies to the public such a reliable source of information, I think persons who have the care of large numbers of helpless boats should apply to it for information and advice. There is no evidence whatever that the Director General did so. No such rule, as far as I am aware, has been laid down by judicial authority; but it seems to me that such a requirement will not only increase safety of life and property in the harbor, but will encourage the National Weather Bureau to progressive improvement and usefulness. Therefore I hold that the Director General was wanting in due care and diligence in not applying to the local bureau, under the circumstances in this case, for a forecast of the weather. If he had done so seasonably, I am sure he would have been advised of the danger to the boats at Bush's Piers, and would have had plenty of time to remove them to a safe berth. See Nicholson v. Erie R. Co., 255 Fed. 54."

The above case was reversed by the C. C. A. (2nd) under the caption of "The Headlight," 300 Fed. (2) 84, upon the theory of "jural personality" of the Tug. However this fiction with relation to railroads operating tugs in interstate commerce was discredited in the instant case. This is in accord with the views of this Court, in

*Consumers Import Co.* v. *Kabushiki* (Advance Opinions, Vol. 88, pp. 9, 11 [Nov. 8, 1943]).

This very storm was involved in the case of *McAllister Bros. Inc.* v. *The Pennsylvania Railroad,* 1941 American Maritime Case 492, and Judge CAMPBELL (E. D. N. Y.) said at page 498:

"Sufficient has been said in the statement of facts in this opinion, as to the warnings of a hurricane and its progress along the Atlantic Seaboard for at least three days before the storm broke at New York on September 21st, and the specific warning of its approach to the New York area given on the morning of September 21st, should have apprised the respondent of the danger of a severe storm breaking at New York. *Philip Rice* v. *City of New York, et al.*, 1939 A. M. C. 526.

"It was the duty of the respondent, where there was a warning of a wind from the northeast, accompanied by a rapidly falling barometer, which would indicate a backing of the winds to the northwest, to make inquiry as to the probable progress of the storm. *O'Brien Bros., Inc.* v. *Director General of Railroads*, 287 Fed. 543, 544."

That case was affirmed in 118 Fed. (2nd) 45 (1941). The C. C. A. 2nd Circuit said at page 46:

"Moreover at or before 1:00 P. M. the Weather Bureau conveyed a second specific warning predicting a greater intensity of a wind already at 50 m. p. h. and a shift from north to northwest."

Also at page 46:

"* * * the warning at 11:00 A. M. of 'shifting gales,' 'winds of hurricane force' and 'north gales backing to northwest * * * today' should have moved it to reasonably prompt action."

In *The Johnson*, 1939 American Maritime Cases 526 (E. D. N. Y.), Judge Inch said with regard to this same storm (p. 529):

"Ample warnings of this violent storm had been given several times daily from September 17th to and including September 21st. Repeated attention was called to the hurricane's approach and the cor-

responding danger. The nearer the storm approached, the greater the danger."

In *New York Trap Rock* v. *Merritt Chapman,* 1941 American Maritime Case, 801 (E. D. N. Y.) Judge CAMPBELL said with regard to this same storm (p. 802):

> "Even casual observation of the storm warnings should have put the respondent on notice of an approaching tropical storm and the failure to make such observation is evidence of negligence. * * * Aside from such storm warnings, the hourly increase in the velocity of the wind must have caused any attentive mariner to expect a still further increase in the velocity of the wind."

In *The Salutation,* 239 Fed. 421 (S. D. N. Y.) (1916), it was held to be negligence to fail to make inquiry for the weather reports. Judge HOUGH said at page 425:

> "But there is one very old source of marine information which was consulted by the masters who have testified, viz. the barometer. The barometer had begun to fall on the 28th, and fell rapidly all the morning of March 1st. It is admitted that the glass had been going down to the knowledge of Captain Kniffen for nearly if not quite eighteen hours before he left Bridgeport; and when he left it was very low, and by the time he returned minus his tow it had reached a depression almost unexampled in the history of the Weather Bureau. * * * It therefore stands confessed that the 'Salutation' went out of Bridgeport harbor in intentional ignorance of anything and everything the Weather Bureau advised, in the expectation of a westerly storm, and in the face of a very low and long-falling barometer. The legal inquiry is whether such actions as this constitute reasonable prudence. In my opinion, even without the Weather Bureau warnings, the condition of the barometer and the acknowledged expectation of storm from the west were enough to render it

> proper to stay in port. But it was also negligence not even to inquire for the official weather reports."

In the *T. J. Hooper,* 53 Fed. (2nd) 107 (S. D. N. Y.) (aff. 60 Fed. [2] 737 cert. denied 287 U. S. 662), Judge Coxe said at page 109:

> "The question then arises whether the towage was negligently performed. The tugs were not insurers, but were required to use reasonable care and skill in the service they had undertaken. They were bound to respect barometer readings and weather indications; and for failure to do so are liable for resulting damage."

The obligation of a common carrier is much more onerous and stringent than that of a tower.

In the *Victoria,* 79 Fed. 122 (S. D. N. Y.) (1897) Judge Addison Brown said, page 123:

> "* * * I am satisfied that the tugs had abundant reason, through the cautionary signals that had been displayed, and from the signs of storm * * * to require them to examine the state of the weather * * *.
>
> "The testimony of the captains of the tugs indicates that they were not accustomed to pay attention to cautionary signals. If this is the practice, it must certainly be at their risk."

In *Maryland Transportation Co.* v. *Dempsey,* 279 Fed. 94, 97, the C. C. A. 4th (1921) said in a towage case where the liability was not that of a common carrier, that to start out when the barometer had been falling:

> "without so much as an inquiry as to the existence of storm signals, was of itself negligence"

citing *Doherty* v. *Pa. R. R.,* 269 Fed. 959, 963 (1920).

In the *Doherty* case at page 963 the C. C. A. 2nd said (following its own decision in *Nicholson* v. *Erie,* 255 Fed. 54):

"That the respondent was negligent in the instant cases and failed to exercise the care which a man of ordinary prudence would use under like conditions, seems to us evident * * *."

"The respondent's agents paid no attention to the signals of the Weather Bureau * * *."

In *McWilliams* v. *Davis*, 285 Fed. 312 (1922) (cert. denied 260 U. S. 747) the C. C. A. 2nd Circuit said at page 315:

"The tug masters working about the harbor are bound to take notice of warnings and protect their tows accordingly."

In the *New York Central No. 16*, 50 Fed. (2nd) 393, the C. C. A. 2nd Circuit said:

"The claimant prevailed in the District Court on the ground that the collision was the result of inevitable accident. If the failure of the No. 16 to observe and make ready for the approaching storm could be laid aside, we should be able to agree. * * * But the previous neglect of the No. 16 cannot be condoned. Although the evidence is overwhelming from witnesses, including an official weather observer, that the natural and usual indications which precede such a storm were multiplying around him, the Captain of the No. 16 saw none of them, heard none of them, and placed his tug and tow broadside to the wind. * * * He cannot be excused for such indifference to the storm warnings nature gives an observant navigator. * * *"

In *Nicholson* v. *Erie R. R.*, 255 Fed. 54 (1918) the C. C. A. 2nd Circuit said (Judge HOUGH) at page 55:

"It was some evidence of negligence that the navigators of respondent paid no attention to the official warnings of the northwest storm, which was the principal cause of libellants' damages. It is not held that mere failure to observe storm warnings or to obey them is conclusive proof of negligence;

> but it is evidence of a failure in that ordinary care and skill which is a master mariner's duty. In substance, we agree with the remarks on this subject contained in The Salutation (D. C.) 239 Fed. at page 423. The evidence herein shows that the testifying masters considered it no part of their duty either to observe or give weight to the Weather Bureau's advice. This was in error. We think such duty exists."

The Daily Records of the New York Office of the Weather Bureau for September 20, and September 21, 1938 (R. 214), graphically portray the fall of the barometer on September 20, and the rapid fall from ten A. M. September 21. This should, of itself have been a warning under the decisions, that the New York Harbor was in the danger area and the master of the tug *Transfer No. 20* should not have been left to act upon his own responsibility, unadvised as to these facts.

In the *Chehaw*, 54 Fed. (2nd) 645, 1931 (S. D. N. Y.), Judge WOOLSEY said:

> "Any tug which pits its own experience against the accumulated experience of other men and goes to sea in face of storm signals, does so at its own risk. But it may be exonerated by the event."

From the above cases, it is apparent that the decisions in the Second Circuit have always been in accord with the instant decision, except as to the fiction of jural personality of the tug (a fiction recently disapproved by this Court).

It was therefore the duty of the Pennsylvania Railroad and the New York, New Haven Railroad, as interstate rail carriers engaged in harbor lighterage on a large scale and for a long time, to maintain an adequate system of weather observation, and transmit such data to the various dispatchers' offices; so that the dispatchers and tug captains would keep themselves informed as to the hazards.

The defendant Railroads had no system of weather observation nor did they transmit any reports of the Weather Bureau or the character of the storm signals or the action of the barometer to the captains of the tugs or even to the dispatchers (R. 27, 31, 35, 49, 105, 109 and 122).

At page 11, petitioner says that the noon weather forecast in response to which the Weather Bureau hoisted hurricane flag signals, indicated that a tropical storm, central about 100 miles east of the Virginia Capes was moving rapidly northward attended by shifting gales—that this forecast said nothing about the hurricane's striking New York.

The noon forecast, September 21st, read (R. 214):

> "Change to whole gale warnings 11:30 AM Atlantic Coast north of Virginia Capes to Sandy Hook, N. J."

Sandy Hook is well known to be a part of New York Harbor. Furthermore this warning stated that the center of this storm was pursuing a course, which, if continued, would bring the storm center near New York Harbor.

Hurricanes in the latitude of New York have a diameter of several hundred miles, so that even though the center passed over Long Island, New York Harbor was bound to experience a gale force of wind.

The petition (pp. 5 and 12) also poses a question whether a tug, is to be charged with an "obsolete" or "current" forecast.

The petitioner again overlooks the many forecasts and warnings issued by the Weather Bureau during the preceding three days as well as during the day of the accident (R. 214) and overlooks the other facts in the case such as the storm warning signals flying from 7 A. M. to 6:30 P. M., the rapidly dropping barometer, and the wind velocity which had increased steadily through the morning until

it reached 60 miles per hour at the time the railroad tug started with respondent's goods to cross the harbor over the dangerous shoal flats (R. 214 and 437).

The "current" warnings were those distributed by the Local Office after it received from Washington the noon warning at 12 M. (R. 214). The "current" storm signal was the "whole gale" or "hurricane" signal flying from 12 M. until sometime after 2:15 P. M. (R. 138) when the tug left (R. 215, 6, 7), and the "current" barometer was the lowest that it had been since 1912 (R. 214, 133).

At page 19, the petition refers to the "hauling down of the Hurricane signals and substitution of Northwest storm signals at 2:15 P. M." In the first place, storm signals were continuously displayed throughout the day from 7 A. M. to 6:30 P. M. In the second place, the instructions from Washington to display "northwest" storm signals were *received* by the New York Office at 2:15 P. M. (R. 214) (at the moment the tug and carfloat started on the trip, as thrice found as a fact by the District Court, R. 215, 216 and 217). The position of the flagpole on the roof of the Weather Bureau Building at the Battery in New York, precludes the possibility of this change in signals until some time *after* 2:15 (R. 138) when the instructions were received and when the tug started its trip.

It is to be borne in mind that the "hurricane" center did not pass over New York Harbor but over eastern Long Island and that it was the heavy force of wind on its periphery (New York) which the petitioner encountered.

At page 20 the petition cites *The Bump,* 56 Fed. 2nd 203, E. D. N. Y. In that case the storm warning had been taken down and not replaced with another storm warning, whereas in the instant case, the storm warnings flew continuously from 7 A. M. to 6:30 P. M. (R. 214).

## POINT III.

**The railroad industry cannot now be in doubt as to its duty to avail itself of the free Weather Bureau service in order to be informed of forecasts of hazards to goods in transit, from unusual storms or hurricanes.**

The Third Point of the petitioner (p. 20), is that this decision leaves the industry in doubt as to its rights and obligations, in that the *O'Brien* (*Headlight*) case, 300 Fed. 84 (C. C. A. 2) was overruled by the instant C. C. A. 2 decision in the following two respects:

(a) That under *The Headlight* decision, the owners of tugs need not apply to the Weather Bureau for *special* (private—unpublished) forecasts and that the only duty was to keep themselves acquainted with weather warnings publicly displayed.

In the instant case all the warnings were publicly displayed, and published.

In the instant case the C. C. A. 2 did not criticize the above rule. It only criticized the *O'Brien* (*Headlight*) case for its fiction as to jural personality of the tug.

(b) That *The Headlight* case held that a tug is not obliged to carry *or consult* a barometer (Petition, p. 22).

*The Headlight* case did hold that a tug need not "*carry*" a barometer but it did not hold that its owner, a railroad *engaged in transporting goods in interstate commerce,* was not obliged to *consult* a barometer on shore under impending dangerous storm indications.

In the instant decision the C. C. A. 2 has not held that the *tug* must carry a barometer. It merely said that the carrier (railroad owner) had no barometer at Greenville or anywhere else—a fault on the part of one engaged in such extensive maritime operations (R. 228).

In the instant case, the barometer dropped to the lowest since 1912 (R. 133).

*The Headlight* case (*supra*) involved not the liability of a common carrier for merchandise, but the liability of a tug owner for negligence in damaging a barge during shifting operations.

**The Tug as a Jural Person.**

At page 22 of its brief, petitioner criticizes the following statement of the Circuit Court of Appeals, in the instant case:

> "The fiction that in such a situation the liabilities are to be judged by treating the tug as a jural person has neither reason nor authority to commend it. *Pro tanta,* we therefore overrule *O'Brien Bros.* v. *Davis, Director General, supra* (300 Fed. Rep. 84)" (R. 226-7).

The petitioner argues that the Circuit Court of Appeals has not expressed the law correctly, but petitioner probably overlooks the case of *Consumers Import Co.* v. *Kabushiki Zosenjo,* decided Nov. 8, 1943 (Law Ed. Advance Opinions, 1943-1944, Vol. 88, p. 9) in which this Court said (p. 11):

> "It seems unnecessary * * * to review the historical development of the fiction that the ship for some purposes is treated as a jural personality apart from that of its owner."

And quoting from *The City of Norwich,* 118 U. S. 468, 502, this Court said that:

> " 'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles.' The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age."

It would not encourage a railroad to act diligently if railroad cars were lightered on the basis of such a fiction. Nor would it raise a "stringent motive for the exercise of carefulness in his trust."

See

*Railroad Co.* v. *Lockwood* (*supra*).

If these railroads assumed, as petitioner states (p. 23) that they were under no obligation to obtain from the Weather Bureau and pass on to their employees, storm warnings, then it is high time that the Circuit Court of Appeals for the 2nd Circuit, should have expressed itself clearly to the contrary and thus brought itself in agreement with the law in the other Circuits. The record in this case shows that some carriers gave their name and telephone numbers to the Local Weather Bureau in order to enjoy the free service and warning advices afforded by the latter. The New Haven Railroad did nothing. Unfortunately, there may have been an impression that to avail itself of the advice given by the Weather Bureau and by a barometer might lead to liability, whereas ignorance might be a shield of immunity.

There is no conflict between the instant decision and the decisions of other Circuit Courts of Appeal, and no basis for the issuance of the Writ.

**Opinion of the Circuit Court of Appeals.**

The Circuit Court of Appeals, 2nd Circuit gave careful consideration to this case and wrote a painstaking and able opinion; whereas, the District Court had declined to consider briefs (R. 206) and wrote no opinion.

**Writ Should Not Issue.**

We respectfully submit that this Court will not issue the writ merely in order to enter into an elaborate discussion of one of the oldest established principles of the law of

common carriage, to wit: that the defense of Act of God is no excuse where negligence intervenes, and a discussion of whether the question of negligence can be examined by the Circuit Court of Appeals where, as here, the District Court has made no Finding of Fact as to negligence, and has treated the question as one of law, and the trial was a non-jury trial, had subsequent to 1938 when Rule 52 of the Rules of Civil Procedure adopting the equity practice, took effect.

**Conclusion.**

The petition itself, and the foregoing responsive brief, both show that the case presented makes no ground for the issuance of a writ of certiorari.

It is respectfully submitted that the petition should be dismissed.

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